BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF CROW ROOFING & SHEET METAL, INC., Appellant, v. PUGET SOUND AIR POLLUTION CONTROL AGENCY, Respondent.	PCHB Nos. 1098, 1101, 1105, 1119, 1120, 1136, 77-17, 77-33, 77-42 and 77-44 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

These matters, the consolidated appeals of 12 civil penalties, came before the Pollution Control Hearings Board at a formal hearing in Seattle on May 4, and 5, 1977. Board members Chris Smith and Dave J. Mooney were in attendance for part of the hearing on May 4, and for all of the hearing on May 5, 1977. Hearing examiner David Akana presided.

Appellant was represented by its attorney, John R. Martin, Jr.; respondent was represented by its attorney, Keith D. McGoffin.

Respondent's Motion to Strike and Dismiss the Appeal in PCHB No. 77-17 was heard preliminarily. Respondent's uncontroverted affidavit

showed that appellant received Notice of Civil Penalty No. 3136 for the amount of $250 on January 13, 1977 and did not appeal such penalty until February 17, 1977. The Notice of Civil Penalty becomes a final order if not appealed to the Board within 30 days of receipt. RCW 43.21B.120. Because appellant's failure to timely appeal the civil penalty prevented the vesting of jurisdiction in this Board to hear the appeal, the Motion to Strike and Dismiss the Appeal must, therefore, be granted.

Appellant filed a memorandum; counsel made opening statements.

Having heard or read the testimony, having examined the exhibits, having considered the contentions of the parties, and having considered exceptions to the proposed Order from respondent, and replies thereto from appellant, and having granted the exceptions in part and denying same in part, and being fully advised, now therefore the Pollution Control Hearings Board makes these

FINDINGS OF FACT

I

Appellant, Crow Roofing & Sheet Metal, Inc., is located at 9500 Aurora Avenue North in Seattle, Washington. It has been in the vicinity of, or at, its present location since 1953. As a part of its business, appellant provides sealing membranes for building roofs at various job sites in the vicinity of Seattle. In the ordinary course of such business, it transports heated asphalt to job sites in asphalt tankers or asphalt kettles.

II

In 1975 appellant began replacing its asphalt kettles with tankers. The total cost of the equipment changeover was $67,000. Such changeover

was in anticipation of a requirement for use of tankers rather than kettles by the City of Seattle because of air pollution problems associated with kettles. The use of tankers would also allow appellant to save 40 percent in its energy costs. However, Appellant continues to keep kettles in its inventory for use at places where a tanker is not suitable.

III

Appellant maintains an office, shop, and storage shed on its property. The south portion of the premises is used to park its equipment, trucks, kettles, and tankers. Appellant owns five tankers of various capacities, including one 15 ton, two 6 ton, and two 3 ton tankers. The 15 ton tanker is used to pick up and store hot, liquid asphalt and is parked on the premises near a source of electricity. Pursuant to fire department regulations, the tankers are parked not closer than 25 feet to appellant's southern boundary line. While parked at the premises an electric heater in each of the 6 and 15 ton tankers maintains the temperature of the asphalt at about 400°F. The 3 ton tankers are not electrically heated. Ordinarily, the 6 ton and 3 ton tankers are used at job sites. Before departing, these tankers are filled with asphalt from the 15 ton tanker. Upon returning from a job site, the 3 ton tankers are emptied into one of the larger tankers which has electric heaters to avoid the cooling and the solidification of asphalt in the small tankers. When transferring products, asphalt is pumped from one tanker to another through a two inch hose which is placed through a ten inch diameter opening of the receiving tanker. Emissions which occur in this matter come from the ten inch diameter opening during the transfer operation.

IV

At temperatures exceeding 550°F., asphalt emissions become intolerable and hazardous. At temperatures of 400°F. and lower, emissions are substantially reduced. Appellant maintains its product at 400°F. when parked on the premises and could reduce its emissions further by simply lowering the temperature in the tankers.

V

Appellant's business is located in an area zoned General Commercial by the City of Seattle. Immediately adjacent to the southern boundary of appellant's property is the Central Trailer Park, part of which is in the General Commercial Zone.

VI

When the wind is from the north, some residents in the trailer park have complained to respondent on numerous occasions about the asphalt odor, usually during transfer operations. In response to these complaints, respondent dispatched its inspectors to make investigations. On September 23, 1975 an inspector conversed with appellant's employee about the problem and inspected the tankers. On a later occasion, September 17, 1976, the inspector visited the trailer park site but did not smell anything.

On other occasions, in response to complaints from some of the residents of the trailer park, respondent's inspectors visited the park and ascertained that an odor was coming from appellant's premises. One inspector who visited the site on September 20, 28, and 30, 1976, October 20, 1976, November 12, 1976, February 24, 1977, and March 15 and 24, 1977 testified that he noticed "definite and distinct" asphalt odor.

and did not want to stay on the premises. He further testified that he felt throat irritations, stinging eyes, and/or headaches at and after each visit. The inspector noted such odors when the wind was from the north and the tankers were transferring or appeared to be heating the product. Another inspector who visited the site on November 8, 1976 (see Exhibits R-13 and R-14) noticed an "asphaltic odor" while on the trailer park which he testified caused him to want to leave the area. This inspector testified that he felt a headache after remaining 20 minutes at the trailer park premises. No activity was observed in the yard at that time. A third inspector who visited the site on November 11 and 22, 1976 noticed a "very strong and unpleasant odor" which he testified caused him to want to leave the area. On one occasion, asphalt was being transferred from one tanker to another. The inspector did not know what activity was occurring at appellant's site on the second occasion.

On each of the above dates, at least one of the residents of the trailer park also complained of certain physical effects (including tightness in the chest, headaches, nausea and burning eyes) said to be caused by the odor and that the resident would want to leave the area because of such odor.

Since appellant has switched from kettles to tankers, the surrounding business activities nearby appellant's premises have not noticed unpleasant asphalt odors even though the prevailing wind carries odors in their direction most of the time. At most, persons from such surrounding businesses have detected odors which were quite minor.

Although asphalt odors could cause headaches and nausea, it does

not cause eye or throat irritations unless a person is particularly sensitized to it. The physical effects felt by the inspectors and the residents of the trailer park amounted to, at most, a transitory annoyance or discomfort.

VII

Appellant was not asked to participate in any odor test, nor was it notified of such, prior to the inspectors' visits.

For the foregoing occurrences, appellant received 11 notices of violation, one of which was received by appellant's employee (No. 12572) and the remainder were received through certified mail. For the alleged violations, appellant was assessed a $100 civil penalty (No. 2980) and ten $250 civil penalties which it received by certified mail and subsequently appealed to this Board.

VIII

Pursuant to RCW 43.21B.260, respondent has filed a certified copy of its Regulation I and amendments thereto which is noticed.

IX

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings come the following

CONCLUSIONS OF LAW

I

The Board has jurisdiction over the persons and over the subject matter of this proceeding.

II

Section 9.11(a) provides that

> It shall be unlawful for any person to cause or permit the emission of an air contaminant or water vapor, including an air contaminant whose emission is not otherwise prohibited by this Regulation, if the air contaminant or water vapor causes detriment to the health, safety or welfare of any person, or causes damage to property or business.

Such provision, which is subjective in nature, must be construed in light of the policy of Regulation I which states in part that:

> It is hereby declared to be the public policy of the Puget Sound Air Pollution Control Agency to secure and maintain such levels of air quality as will protect human health and safety and, to the greatest degree practicable, prevent injury to plant and animal life and to property, foster the comfort and convenience of its inhabitants, seek public participation in policy planning and implementation, promote the economic and social development of the Puget Sound area and facilitate the enjoyment of the natural attractions of the Puget Sound area. Section 1.01.

III

Asphalt odor is an "air contaminant" within the meaning of Section 1.07(b) of Regulation I. The presence in or emission into the outdoor atmosphere of such air contaminant "in sufficient quantities and of such characteristics and duration as is, or is likely to be, injurious to human health, plant or animal life, or property, or which unreasonably interferes with enjoyment of life and property" is air pollution. Section 1.07(c and j).

IV

There is no requirement in assessing a penalty under Section 3.29 that the violation be "knowingly" caused or permitted. Kaiser Aluminum, et al. v. PSAPCA, PCHB No. 1017.

V

Section 9.11 is within the authority granted respondent by the

Clean Air Act. RCW 70.94.141; 70.94.331; 70.94.380. Moreover, respondent must adopt regulations which are no less stringent than state standards. RCW 70.94.380. In implementing the Act, the state has adopted regulations which appear to be embodied in respondent's Section 9.11. WAC 18-04-040(5) (superseded by WAC 173-400-040(5)).

VI

The evidence presented was that respondent's inspectors and complainants of the trailer park noticed an objectionable odor which caused them to have certain physical effects when the wind came from the north. The prevailing wind is from a south-southwesterly direction. Other evidence presented was that other persons in establishments surrounding appellant's property did not feel that the odor was objectionable. Whether a violation of Section 9.11 has occurred under such circumstances is necessarily a subjective determination. The Agency must show by a preponderance of the evidence that an air contaminant caused detriment to the health, safety or welfare of any person or caused damage to property or business. In weighing the evidence in these matters, there is adequate proof that significant detriment was caused or allowed at the times and dates alleged. As such, appellant was shown to have violated Section 9.11 of respondent's Regulation I. Therefore, the 11 civil penalties assessed for the violation of Section 9.11 (Nos. 2980, 2987, 2988, 3038, 3094, 3100, 3112, 3101, 3225, 3246, and 3252) should be affirmed. However, $50 of Civil Penalty No. 2980 and $200 of each of the remaining penalties should be suspended.

VII

Appellant appears to have received each notice of violation reasonably soon after each incident. Moreover, each incident reported by an inspector was corroborated by another witness. Under such circumstances, it cannot be held that respondent's practices violated due process or fundamental fairness. Air Pollution Variance Board v. Western Alfalfa, 9 ERC 1236 (1976).

VIII

Respondent's Section 3.05(b) does not require notice to appellant that an investigation of an alleged violation is about to occur.

IX

This Board has no jurisdiction to decide substantive constitutional issues and must presume statutes and regulations to be constitutional. See Yakima Clean Air v. Glascam Builders, 85 Wn.2d 255, 257 (1975).

X

Appellant's remaining contentions are without merit.

XI

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions, the Pollution Control Hearings Board enters this

ORDER

1. The appeal of Civil Penalty No. 3136 in PCHB No. 77-17 is dismissed.

2. Civil Penalty Nos. 2980, 2987, 2988, 3038, 3094, 3100, 3112, 3101, 3225, 3246, and 3252 are affirmed, provided however, that $2,050

of the $2,600 total penalty is suspended.

DATED this 19th day of September, 1977.

POLLUTION CONTROL HEARINGS BOARD

CHRIS SMITH, Member

DAVE J. MOONEY, Member